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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1602

WALTER E. CRAVEN, Warden California State Prison at Folsom,

Respondent,

vs.

RICHARD L. CARMICAL,

Petitioner.

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari

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PRELIMINARY STATEMENT

Respondent's Brief in Opposition to the Petition for Writ of Certiorari, in addition to presenting argument on the issues raised in the petition sets forth in an "Introduction" arguments which he asserts militate against granting the petition. We respond first to the contentions raised in this introduction, and then to the arguments made.

I

REVIEW BY CERTIORARI IS APPROPRIATE AT THIS TIME

Respondent advances three points alleged to militate against the granting of the petition: 1) that the case was remanded for a hearing to prove or disprove the facts alleged; 2) that the "clear thinking" test at issue is no longer in use in Alameda County and accordingly does not present an important problem in the administration of

justice; and 3) that the state's claim as to the impact of the decision is wholly speculative. We disagree with respondent's characterization of the case and submit that review at this time will prevent the development of significant problems in the administration of justice and the needless waste of time in the increasingly crowded state and federal courts.

It is of course true that the facts as developed at a hearing in the District Court on remand may prove to be different than those alleged in the petition. However, if, as the District Court found and as petitioner has urged in this Court, the facts alleged in the petition do not demonstrate that the jury panel was unconstitutionally selected, return of this case for an evidentiary hearing would result in a totally unwarranted waste of limited judicial resources. Moreover, if the facts developed at a hearing do in fact disprove the allegations of the petition, the states comprising the Ninth Circuit are left with a decision which establishes what is in our view a totally erroneous statement of the law and its application to the jury selection process, or at least, with conflicting statements of the applicable standard. Compare *Lattimore v. Craven,* 453 F.2d 1249, 1251 (9th Cir. 1972).

Respondent has claimed that the case has no significance because the test at issue was discontinued in 1968, and the state's claim of retrials in the hundreds is speculative. We submit that the potential impact of this interpretation of the criteria for jury selection is enormous because it may require not only retrials in Alameda County, but is totally retroactive and applicable throughout the Ninth Circuit. We do not know how many counties in California or states in the Ninth Circuit utilize "intelligence" tests. However, challenges to such tests on the basis of disproportionate

representation have been made in Los Angeles County, the most populous in California, and in Sacramento County.[1]

Finally, the case in its present posture raises a significant issue of deliberate by-pass—the extent to which federal courts should inquire into the motives and knowledge of counsel years after the event where there is no question of the fairness of the trial or the justice of the result.

We submit that this case raises issues of significance which should be determined by this Court at this time, and that further proceedings in this case, and in the others which will inevitably be filed should certiorari be denied, will unnecessarily burden both state and federal judicial systems.

II

THE QUESTION OF WHEN DELIBERATE BY-PASS OF A VALID STATE PROCEDURAL RULE PRECLUDES HABEAS CORPUS RELIEF IS AN IMPORTANT ONE WHICH SHOULD BE CONSIDERED AND DECIDED BY THIS COURT

In his state court trial, respondent Carmical raised no question concerning the racial composition of the jury panel from which the jury which tried him was selected. For the reasons stated in our petition, we take the position that Carmical's failure to challenge the panel before trial in accordance with state procedure precludes granting relief on federal habeas corpus, without further inquiry into counsel's or respondent's reasons, at least in cases where there is no credible claim of incompetence of counsel.

Respondent in opposing the petition for writ of certiorari on this question asserts that the decision below was correct because the state did not "fulfill its burden of demonstrat-

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1. *See, Donaldson v. California*, 404 U.S. 968 (1971); *People v. Jones*, 25 Cal.App.3d 776, 102 Cal.Rptr. 277 (1972); *People v. Sylvester*, 3 Crim. 6488 (Sacramento).

ing an affirmative, intelligent waiver of known constitutional rights . . . ." citing *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Fay v. Noia*, 372 U.S. 391 (1963), and two recent cases decided by this Court: *Humphrey v. Cady*, 405 U.S. 504 (1972); *Peters v. Kiff*, 33 L.Ed.2d 83 (1972). (Brief at 7-8.)

In *Humphrey v. Cady*, the defendant had raised constitutional questions concerning the Sex Crimes Act in the state court proceedings, but the defendant's counsel failed to file a brief on the questions as requested by the trial judge. When counsel failed to act, the court concluded that the state petition was sufficient to support the order continuing confinement. No appeal was taken from the order. The District Court concluded that the failure of counsel to file a brief amounted to a deliberate strategic decision to abandon the constitutional claims and barred federal relief. On these facts, this Court held that a hearing was necessary to determine the reason for counsel's failure to file a brief and the extent of the defendant's participation. This Court noted that a defendant is not necessarily bound by counsel's decision.

We submit that in the instant case different circumstances require a different result, and that despite the use of the "knowing and intelligent waiver" standard in *Humphrey*, failure properly to challenge a jury should preclude federal habeas corpus relief without further inquiry as to the reasons.

This Court's use of the "knowing and intelligent waiver" standard in *Humphrey* cannot logically or even usefully be extended to all trial decisions which involve constitutional rights;[2] both the burden on the courts and the

2. Inquiry into motivation must end somewhere. *Cf., McMann v. Richardson*, 397 U.S. 759, 768-69 (1970). In *McMann*, this Court held that a counseled defendant was not entitled to a hearing on his allegation that his plea of guilty was motivated by a coerced

potential for disrupting the administration of justice are too great. Are we, for instance, to have a federal judicial inquiry into the motives and knowledge of counsel who fail to cross-examine a witness or who do not call a possible witness? Are we to conduct, years later, a federal court hearing to determine whether a defendant made a "knowing and intelligent waiver" of his right to testify or his right not to testify?

Respondent points out that in *Peters v. Kiff, supra,* this Court upheld a habeas petitioner's claim of systematic racial exclusion even though the claim was not raised at trial. We note that the opinions constituting a majority in that case did not discuss the issue of deliberate by-pass, so apparently it was not raised as an issue in the case. It was pointed out in the dissenting opinion, however, that *Hill v. Texas,* 316 U.S. 400 (1942) on which Mr. Justice White's concurring opinion relied, was expressly limited to cases where timely objection had been made. 33 L.Ed.2d at 99 (fn). Since the question was not ruled on, the case does not preclude consideration of the question here. Moreover, in *Peters,* the Court was establishing a new rule of standing which at least provided a reason for reaching the issue despite the doctrine of deliberate by-pass. In the instant case, respondent insists that the rule applied by the Court of Appeal is not a new rule; thus, there is no reason for setting aside valid state procedural rules.[3]

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confession. This Court considered his plea a "plain by-pass" of state remedies in regard to testing the confession and commented that whether it was intelligent depended on whether he was so incompetently advised by his counsel he should be afforded another chance. There has been no claim of incompetent counsel here.

3. It is our position that the Court of Appeal incorrectly interpreted the existing law while purporting to follow it, thus, in effect establishing a new rule. If this Court does establish a different standard, it should be prospective only, in accordance with *Peters.*

As pointed out in our petition, no legitimate interest of a criminal defendant is protected by permitting collateral attack on federal habeas corpus where he has failed to raise the issue at the proper point in the trial process. The state, however, has a compelling interest in the finality of trials which have been fairly conducted with a jury satisfactory at the time. We submit that the reasons which dictate the use of the "knowing and intelligent waiver" standard in appropriate cases do not apply here and no legitimate interest of the defendant is protected by applying it.

III

THE DECISION BELOW INCORRECTLY APPLIED THE STANDARDS ESTABLISHED BY THIS COURT

Respondent urges that the decision below is not in conflict with decisions of this Court and that the state's position that the case improperly applied decisions of this Court is based on a semantic quibble over the word "objective" (Brief at 9-10).

The state does not contest the proposition that the statistics presented by Carmical below were sufficient to make out a prima facie case of jury discrimination based on the cases decided by this Court.[4] However, these statistics were not the only information presented to the court. The petition showed that the disproportion was due to an objective test of 25 questions which was given to all prospective jurors. While respondent's brief states that "the test was culturally biased so that blacks would fail it in greater

4. We note, however, that the "statistics" presented to the District Court and to this Court (Brief at 5) also showed that of 47 jurors chosen from the two selected districts in 1966, the year of Carmical's trial, 6 were Negroes, a percentage of 12.8. As of 1968, Negroes constituted 12.4 of the county population. *See, People v. Newton*, 8 Cal.App.3d 359, 389, 87 Cal.Rptr. 394, 414 (1970).

proportions than whites" (Brief at 11), this is not supported by any allegation in the petition. In his testimony and affidavit, the psychologist concluded that the test must measure something other than average intelligence because it was difficult to come to the conclusion that such a high percentage of non-whites were below average. The possible reason given was that some questions (20, 21 and 25) had a "cultural bias" and could account for the difference. It was the opinion of the psychologist that the test was made up without considering cultural differences. Thus, there is nothing to support the statement that the test was biased "so that" blacks would fail it. The test was before the courts below and is before this Court. It is obviously racially neutral. Even if it is "culturally biased," whatever that may mean, that does not make it unconstitutional. Any jury panel must deal with problems and issues couched in the language and values of the prevailing culture. There is no constitutional requirement that tests to screen jurors must be so phrased that proportional percentages of various groups are chosen. Indeed, this Court has held directly to the contrary. *See, Fay v. New York,* 332 U.S. 261 (1947). We also note that respondent's and the psychologist's other criticisms of the test—that it was too short, that the passing grade was too high, and that a time notice should have been given—apply equally to everyone taking the test. While these factors may have made the selection process imperfect, again, it was completely "racially neutral."

Respondent urges that the decision below

> "comes squarely within the rationale of *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), and *Gaston County v. United States,* 395 U.S. 285 (1969), holding invalid tests or other selection methods that serve no valid purpose and that have a racially discriminatory impact, regardless of the intent behind their use." (Brief at 11.)

He then urges that the test for jury discrimination should be no less stringent than for job discrimination, citing, to buttress this conclusion, *Jefferson v. Hackney*, 32 L.Ed. 285 (1972). Neither *Griggs* nor *Gaston* applies to this case, and *Jefferson* provides support for the state's position herein.

In *Griggs*, this Court indicated that it granted review

> "to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites."

Section 703(a) of the Civil Rights Act provides *inter alia* that it shall be an unlawful practice for an employer to classify his employees in ways to adversely affect his status because of his race, color, religion, sex or national origin. Section 703(h) provides that is is not unlawful to give or act on the results of a professionally developed ability test provided the test "is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The Court in *Griggs* was concerned solely with interpreting the meaning of the Act. The Court noted that the objective of Congress was to achieve equality of job opportunities and remove past barriers:

> "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices . . . . What is required by Congress is the removal of arti-

> ficial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . . The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is 'prohibited.' *Id.* at 4319.

The Court then went on to discuss the meaning of section 703(h) authorizing test not "designed, intended or *used* to discriminate . . ." (Emphasis added by Court). The Court noted that the Equal Employment Opportunity Commission, with enforcement responsibility, had issued guidelines interpreting this section to permit only the use of job related tests. The Court then reviewed the legislative history of the Act and concluded that the guidelines expressed the will of Congress. *Id.* at 4320-21.

Thus, the decision is based entirely on statutory construction and not on constitutional requirements. We submit that such a decision interpreting a statute and related to the entirely different problems of employment is entirely inapplicable to the instant case. There is no constitutional violation in a jury selection process unless intentional discrimination on grounds of race is shown. The *Griggs* case does not change in any way the position of the Court expressed in *Carter v. Jury Commission,* 396 U.S. 320 (1970) and *Turner v. Fouche,* 396 U.S. 346 (1970).

Gaston involved the interpretation of the Voting Rights Act of 1965 which suspended the use of any test or device as a prerequisite to registering to vote in a jurisdiction in which less than 50% of the voters were registered. The burden was on the jurisdiction to rebut the presumption of

discrimination. The court concluded that it was appropriate to consider whether a test had the effect of denying the right to vote because the jurisdiction had maintained separate and inferior schools.

Respondent cites *Jefferson* in support of his argument on the basis that this Court distinguished *Griggs* not on grounds of statutory interpretation but on grounds that the *Griggs* test had no legitimate purpose while the Texas statute in *Jefferson* served a reasonable supportable purpose of the state. Thus, his argument continues, the present case is within *Griggs* because the clear-thinking test served no legitimate function (brief at 11, note 8). Respondent not only misapprehends *Jefferson,* but misstates the "facts" in the instant case.

First, there is nothing in the record before this Court to establish by allegation or otherwise that the test in question served "no legitimate function whatever." The function of the test was to select jurors of ordinary intelligence pursuant to California statutes. That it did this less than perfectly does not make it constitutionally deficient. Second, in *Jefferson,* this Court declined to find invidious discrimination in the unequal reduction of benefits among AID classes merely because there was a larger percentage of Negroes and Mexican Americans in the class with the greatest reduction, where there was no intent to discriminate in establishing the reductions. While *Jefferson* involved the distribution of benefits and the interpretation of the Social Security Act and thus had no necessary applicability to the jury discrimination problem, it does stand for the proposition that disparity in racial percentages absent a showing of intentional discrimination does not constitute a violation of equal protection.

We submit that the use of the test at issue here, even if it was imperfect, did not violate constitutional standards

and that the decision of the court below was clearly erroneous and in conflict with decisions of this Court.

CONCLUSION

For the above reasons, we respectfully submit that the petition for Writ of Certiorari be granted.

Dated: October 4, 1972

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